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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO. 1098 OF 2017
IN
SUIT NO. 12 OF 2014

Bhupesh Sevantilal Shah, ...Applicant/Plaintiff.
vs
M/s Bhoomi Tractors Sales & Services
& Ors. ...Respondents.

.....

Mr Sahil Mahajan for the Applicant/Plaintiff.
Mr Sandeep M. Hirvadekar I/b A. Bharat & Co. for the Defendants.

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CORAM : B.P.COLABAWALLA, J.
JANUARY 14, 2019.

ORAL JUDGMENT :

This Chamber Summons has been filed seeking a direction against the Defendants / Judgment Debtors to file an affidavit stating the particulars of their assets (movable and immovable) as provided under Order XXI Rule 41 Sub-rule (ii) of the Code of Civil Procedure, 1908 (for short the "CPC"). Prayer clause (b) in the Chamber Summons is to detain the Defendants / Judgment Debtors in a civil prison, in case they do not comply with the order passed by this Court for disclosure.

2 Initially, since disputes arose between the Plaintiff and

the Defendants, the above suit came to be filed in this Court seeking a direction against the Defendants jointly and/or severally to pay to the Plaintiff a sum of Rs.1.26 Crores together with further interest at the rate of 18 % per annum from the date of filing of the suit till payment and or realization.

3 This suit came to be decreed pursuant to an amicable settlement arrived at between the parties by filing the consent terms dated 14th June, 2016. As per these consent terms, Defendant Nos.1 to 7 admitted their liability and in full and final settlement agreed to pay a sum of Rs.1,12,50,214/- to the Plaintiff in installments, the last payment to be made on or before 31st December, 2016. The suit was accordingly disposed of in terms of the consent terms.

4 It is an admitted fact before me that the monies payable as per the consent terms have not been paid by the Defendants to the Plaintiff. The Defendants have paid only an amount of Rs.34,99,786/- and the balance amount of Rs.77,50,428/- together with interest has not been paid. It is, in these circumstances, that the present Chamber Summons has been filed seeking a direction against the Defendants to disclose the particulars of all their assets (movable and immovable) as provided in Order XXI Rule 41 Sub-Rule (2) of the

CPC.

5 Defendant No.3 being a partner of Defendant No.1 has filed an affidavit of reply opposing the Chamber Summons. According to the Defendants, the Plaintiff has security worth almost Rs.2.30 Crores and hence there is no necessity for the Defendants to disclose any of their movable and/or immovable assets. It has been further argued by the counsel for the Defendants that this Chamber Summons is not maintainable as it is filed in the suit which is already disposed of and not in the execution proceedings. In other words, it was the submission of the Defendants that since the suit is already decreed and disposed of, this Court becomes functus officio and hence this Chamber Summons cannot be entertained. For all these reasons it was submitted that the Chamber Summons be dismissed.

6 I have heard the learned counsel for parties and have perused the papers and proceedings in the present suit. As far as the maintainability of the Chamber Summons is concerned, I find that this issue is squarely answered by this Court in the case of **United Phosphorous Ltd.** Vs. **A.K.Kanoria [2003 (1) Bom. C.R. 299]**. The identical argument that is made before me was sought to be made before this Court in the case of Phosphorus Ltd (supra). This can be

found in paragraph 11 of this decision. After considering the law on the subject and relying upon a Division Bench decision of this Court in the case of **Cooverji Varjang** Vs **Cooverbai Nagsey Champsey, [42 Bom. L.R. 564]** this Court came to the conclusion that the Chamber Summons filed under Order XXI Rule 41(2) of the CPC can be entertained by the Court that passed the decree. It came to this conclusion on the basis that, this was strictly not an application in execution but it was an application in aid of the execution. Paragraphs 11 and 12 of this decision reads thus -

> "11. Shri Chande, the Learned Advocate for the defendant contended that an application under Order XXI, Rule 41 is an application in an execution petition; according to him. Execution commences on filing of written application (commonly called as Execution Application or Darkhast) under Sub-rule (2) of Rule 11 of Order XXI of the Code of Civil Procedure. Unless the execution petition is filed and numbered, contends Shri Chande, any application under order XXI cannot be filed. Shri Chande submits that after the judgment is delivered, the Court becomes functus officio and only after filing of an execution petition under Order XXI, Rule 11(2), the Court again assumes Jurisdiction. The petition under Order XXI, Rule 41, is to be made to the executing Court and not to the Court which passed the decree, because the Court passing the judgment decree becomes functus officio, the moment judgment and decree is passed.
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> 12. In my opinion, application under Order XXI, Rule 41 is not an application in an execution. It is an application in aid of execution or a step towards the execution. Under Clause (j) of Rule 11(2) of Order XXI of the Code of Civil Procedure, the execution petition must specify the mode in which assistance of the Court is required for the execution of a decree. Clause (j) reads as follows :

(j) the mode in which the assistance of the Court is required whether -

(i) by the delivery of any property specifically decreed.

(ii) by the attachment, or by the attachment and sale, or by the sale without attachment, of any property.

(iii) by the arrest and retention in prison of any person;

(iv) by the appointment of a receiver;

(v) otherwise, as the nature of the relief granted may require.

Examination of a judgment debtor under Sub-rule (1) of Rule 41 of Order XXI or direction to the judgment debtor to file an affidavit to be issued under Sub-rule (2) of Rule 41 or Order XXI is not one of the mode of execution of a decree provided in Clause (j) of Rule 11(2) of Order XXI, Rule 30 . Disclosure of the assets is a preliminary step towards the execution of a decree. Rule Nos. 3 to 9 of Order XXI of the Code of Civil Procedure contemplate transfer of a decree by the Court which passed the decree to another Court for execution. The decree holder, who is not aware of the assets of the judgment debtor, is often unable to decide in which Court he should file the execution petition or in which Court he should get the decree transferred unless he knows the particulars of the assets of the judgment debtor. Rule 41 of Order XXI enables the decree holder to get from the judgment debtor the information of the assets, which is within the special knowledge of the judgment debtor. Therefore, an application under Order XXI, Rule 41 is not an application for execution of the decree but, merely an aid to the decree holder to enable him to execute the decree by obtaining information which is within the special knowledge of the judgment debtor. If this be so, the application under Order XXI, Rule 41 would ordinary precede the filing of an execution petition, though it can also be filed in the pending execution petition itself. I am fortified in this view by the judgment of the Calcutta High Court in **Shew Kumar Company** v. **Grindlays Bank Limited** reported in **AIR 1986 Cal 328** wherein the Division Bench observed in para-9 of its judgment:

> "We accept the contention of the Respondent that an application for examination of a judgment debtor (under Order XXI, Rule 41) is strictly not an application for execution".

In the said case, the Division Bench further held even after the decree is transmitted for execution to another Court, the Court passing the decree retains jurisdiction in respect of the decree and can examine the judgment debtor, under Order XXI, Rule 41. It is not necessary in this case to

> consider whether the Court which passes the decree retains jurisdiction over the decree even after its transmission for execution to another Court, <u>but I am of the opinion that the Court which passed the decree does not cease to have a jurisdiction to entertain an application under Order XXI, Rule 41 at least till the decree is transmitted to another Court for execution.</u>"
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> (**emphasis supplied**)

7 This decision has thereafter been followed by another single Judge of this Court (K.R.Shriram, J.) in the case of **Cipla Limited** Vs **Krishna Dushyant Rana [Chamber Summons No. 735 of 2013 in Summary Suit No.475 of 2010 decided on 31st August, 2016].** Paragraph 7 of this decision reads thus -

> "7. When the matter was listed on 18.6.2015, this Court after hearing the counsels and considering the law, held that a Chamber Summons of this nature can be entertained and there is no necessity of filing execution proceeding under Order XXI Rule 11(2) before filing of an application under Order XXI Rule 50 of the Code of Civil Procedure 1908 or under Order XXI Rule 41 of the Code of Civil Procedure, 1908. The defendant has not challenged this order and this has attained finality. In the said order this court also observed as under:-
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> <u>"At the outset, counsel for the defendant/judgment debtor submitted that this chamber summons is not maintainable and this has to be dismissed because according to counsel, an application under Order XXI Rule 41 of the Code of Civil Procedure, 1908 cannot be filed unless a formal decree was drawn up and remains unsatisfied for a period of 30 days thereafter and without first filing an execution petition under Order XXI Rule 11(2) of the Code of Civil Procedure, 1908. This issue has been considered by this Court in the matter of United Phosphorous Limited Vs. A.K.Kanoria reported in AIR 2003 Bombay 97(1) and this Court has held that such a chamber summons can be entertained and there is no necessity of filing an execution petition under Order XXI Rule 11(2) before filing of an application under Order XXI Rule 50 of the Code of Civil Procedure, 1908 or under Order XXI Rule 41 of the Code of Civil Procedure, 1908.</u> The defendant has filed affidavit-in-reply in which the defendant No.5 has disclosed certain assets. Disclosure is totally incomplete and does not contain any particulars.

For example, defendant states that he has Honda Amaze car. Defendant has not disclosed what is the registration number of the car and whether the car is hypothecated or not. Defendant has also stated that an amount of Rs.24,000/- is invested in mutual fund and an amount of Rs.42,425/- is invested in shares. Defendant has not disclosed in which mutual fund and in which shares he has invested the said amounts. The defendant has also disclosed that an amount of Rs.11,380/- is to be received from Mahavir Developers. No details are provided as to who is Mahavir Developers and on what count amount is to be received from it. Defendant has also mentioned that he has certain bank accounts without disclosing with which branches and account numbers. Therefore, it is quite obvious that an attempt is made to prolong the proceedings and the defendant is also trying to give impression that he has complied with the orders of this Court but at the same time not giving full and complete particulars.

2. This application has been taken out by the plaintiff in aid of execution or as a step towards the execution. Unless the defendant discloses complete details and full particulars, plaintiff will not be able to decide in which Court he should get the decree transferred. Therefore, as and by way of last chance, defendant is directed to disclose in detail and give full particulars of all assets supporting documents and also make a statement that he has made full disclosure of his assets and he has not suppressed any particulars from the Court. Defendant is also directed to furnish copies of his annual returns that have been filed in the last five years.

3 In the circumstances, defendant is called upon by way of last chance to disclose all his assets. A copy of this affidavit to be provided to advocate for the plaintiff on or before 24.6.2015.

S.O. to 25.6.2015."

(emphasis supplied)

8 This being the case, I find that the argument canvassed on behalf of the Defendants regarding the maintainability of the Chamber Summons cannot be sustained and has to be rejected.

9 As far as the argument of the Defendants regarding the Plaintiff having adequate security is concerned, I find that this argument is premature at this stage. Firstly, what is the exact value of these properties, is not something that I have been called upon to

decide, at this stage. All that is sought, is the disclosure of the assets, movable and immovable, of the Defendants. Once this is disclosed and the Plaintiff seeks to attach any of the properties that are in excess of their claim, these objections can certainly be raised by the Defendants, at that stage.

10 This being the case, the Chamber Summons is allowed in terms of prayer clause (a) by directing the Defendants / Judgment Debtors to file their affidavit stating the particulars of all their assets (movable and immovable) including the value of each asset and the status thereof including if there are encumbrances on the same. This affidavit shall be filed within a period of eight weeks from today. It is made clear that prayer clause (b) of this Chamber Summons is kept alive. If for any reason the Defendants do not comply with this order, the Plaintiff will not be precluded from filing a fresh Chamber Summons seeking detention of the Defendants/Judgment Debtors in a civil prison as per the provisions of Order XXI Rule 41(3) of the CPC.

11 The Chamber Summons is disposed of in the aforesaid terms. However, there shall be no order as to costs.

(B.P.COLABAWALLA, J.)